

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee - *claimant*

CASE NO.
UD254/2009
MN242/2009

against
Employer - *respondent*

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly BL

Members: Mr R. Murphy
Mr P. McAleer

heard this claim at Monaghan on 22nd July 2009

Representation:

Claimant(s) : Ms. Mairead McKenna BL instructed by Wilkie & Flanagan, Solicitors, Main Street, Castleblayney, Co. Monaghan

Respondent(s) : In Person

The determination of the Tribunal was as follows:-

Claimant's case

The claimant gave direct evidence that he worked for the respondent company since 1986. He was employed as a general operative. On the 14 June 2007 while carrying a container he slipped on an oil spillage. He injured himself and attended his doctor the following morning and was certified as being unfit for work. Following a request to do so by the respondent company he attended the company doctor in mid July 2007 and was certified to be unfit for work by the company doctor. He was in regular contact with the Human Resources manager hereafter known as NC. She enquired from him if he was making a personal injuries claim and he replied that he did not know. On the 12 August 2007 NC contacted him and informed him that the company had made an appointment for him to attend an occupational therapist on the 23 August 2007. He contacted his doctor following this request and was advised that it was premature to attend an occupational therapist at that stage,

and accordingly he informed NC that he would not be attending the appointment.

He continued to submit sick certificates on a fortnightly basis to the respondent company. The company ceased paying his wages from the last week of August 2007. He contacted his trade union about this matter and the union wrote to the company on the 5 September 2007 explaining his medical position, and seeking that the company review their decision to cease payment of his wages. Following the exchange of a number of letters between the company and his trade union a meeting was arranged for the 12 December 2007. The claimant attended this meeting and informed the company that he was attending a physiotherapist and an orthopaedic surgeon but he had not instituted a personal injuries claim at that stage. NC informed the claimant that light duties would be made available to him on his return to work. On the 8 January 2008 he instructed his solicitor to pursue a personal injuries claim.

On the 25 February 2008 the company wrote to the claimant seeking medical reports from his doctors regarding his medical position and his ability to return to work. The claimant's solicitor replied to this letter enclosing a copy of a doctor's report which stated that the claimant should be in a position to return to work in approximately 2/3 months. This letter also informed the company that the claimant would attend any medicals that the company wished to arrange on his behalf. Furthermore the letter stated that, given the fact that the matter will be the subject of litigation, no other medical reports will be furnished at this venture.

On the 1 May 2008 the claimant contacted the company through his solicitor enquiring about the possibility of being interviewed in relation to returning to work, to perform lighter duties in the short term. At this stage the claimant was feeling desperate about being absent from work. The company wrote the claimant on the 21 May 2008 informing him that there were no tasks available that could be regarded as light duties. On the 11 June 2008 the claimant through his solicitor advised the company that he was still unfit for work and enclosed a letter from his doctor. He continued to submit further medical certificates during his continuing absence from work and attended an appointment arranged by the company with an orthopaedic surgeon in September 2008.

On the 21 October 2008 the claimant and his trade union representative met with the company. The site manager from the company hereafter known as ME was present on behalf of the company. The claimant told ME that he was receiving ongoing physiotherapy. He did not understand this meeting to be a disciplinary meeting. Following the conclusion of the meeting he received a letter from the company dated 11 November 2008 informing him that his employment was terminated with immediate effect. He has not worked since the termination of his employment and has made unsuccessful attempts to secure employment elsewhere.

Under cross examination he confirmed that he suffered neck and back injuries in the workplace and some soft tissue injuries. He confirmed that he informed the orthopaedic surgeon with whom he attended in September 2008 that he, the orthopaedic surgeon, could have reports from a previous MRI scan by contacting his solicitor. He also told him he would attend for a further MRI scan if he was required to do so. During the meeting of the 21 October 2008 with ME he informed him, that he was not in a position to give him a date of return to work as he was receiving ongoing medical treatment. He confirmed he is no longer receiving medical treatment and has been certified as fit to return to work. The company never provided him with a copy of their procedures in relation to absenteeism from work.

In reply to questions from the Tribunal he confirmed that he never received any verbal or written warnings in relation to his work performance and had a very good relationship with his employer.

The company provided him with light duties when he previously had an accident at work. He now feels fit to return to work and stopped receiving physiotherapy in April 2008. He feels that he is fully capable of returning to his previous job with the respondent company.

Respondent's Case

ME gave direct evidence that he is a site manager for the respondent company. He has responsibility for the site in Co. Monaghan and a site in Co. Galway. He has worked for the company since 1985 and replaced NC in Human Resources in May 2008. Upon doing so he examined the claimant's file to establish a clear picture for himself. He wrote to the claimant in June 2008 seeking a return to work date. He was informed that a date could not be provided to him. He then arranged for the claimant to attend an orthopaedic surgeon and received a copy of the surgeon's report. The report stated that the claimant was not co-operating with him. He met with the claimant on the 21 October 2008 and showed him a copy of the orthopaedic surgeon's report. He made it clear to the claimant that his job could not be left open indefinitely and it was important that he, (ME) be provided with a clear picture of the claimant's medical position. He asked him again for a date as to when he would be returning to work but the claimant could not provide him with a date. He made a decision to terminate the claimant's employment. He could not provide light duties to the claimant as the work involved heavy physical work including lifting and climbing.

Under cross examination he agreed that he did not discuss light duties with the claimant. He confirmed that the claimant complied with a full physical investigation carried out by an orthopaedic surgeon that was arranged by the respondent company. Prior to the meeting on the 21 October 2008 he made it clear to the claimant that it was a very serious meeting and he should bring a representative to the meeting.

In reply to questions from the Tribunal he confirmed that the meeting of the 21 October 2008 was arranged as a result of works committee meeting. The claimant was notified directly of the proposed meeting. He had not formed any opinion of the claimant prior to that meeting. He felt he acted fairly towards the claimant as he had been absent from work since June 2007. He sought advice prior to making his decision and the advice was that the claimant's employment should be terminated.

Determination

At the commencement of the hearing the respondent company was not present. The Tribunal having reviewed the file was satisfied that the respondent company were put on notice of the date and venue of the hearing. A phone call was made to the respondent company requesting an explanation for their non appearance and the Tribunal was informed that the company solicitor was outside of the jurisdiction. They were informed that the case must proceed and were welcome to attend at the earliest opportunity. The matter proceeded at 11 am and the claimant went into evidence.

The respondent company arrived at the proceedings towards the end of the claimant's evidence. In the interests of fairness, when the claimant had finished his evidence the Tribunal rose to allow the respondent company time to consider the correspondence opened to the Tribunal by the claimant. The Tribunal also allowed the respondent to cross examine the claimant and to go into evidence albeit out of sequence.

The Tribunal is satisfied that the claimant was on certified sick leave from the 14 June 2007 to the

date of his dismissal on 17 November 2008. The Tribunal is also satisfied that the respondent company are under no legal obligation to hold the claimant's position open for him indefinitely. The meeting arranged for the 21 October 2008 to determine a finite return to work date did not formally advise in advance that dismissal was a potential outcome. Therefore it was procedurally unsound. Accordingly the Tribunal determines that the dismissal was unfair and makes a determination that the claimant should be reinstated without interruption of service or service related entitlements.

Given that the Tribunal determines that the claimant should be reinstated the issue of minimum notice in this case does not arise.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

